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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1622

ST. LOUIS-SAN FRANCISCO RAILWAY CO.,
Petitioner,

vs.

ARMCO STEEL CORPORATION and PULLMAN, INCORPORATED,
Respondents.

BRIEF

Of Respondent Armco Steel Corporation in Opposition to Petition for Writ of Certiorari

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1662

ST. LOUIS-SAN FRANCISCO RAILWAY CO.,
Petitioner,

vs.

ARMCO STEEL CORPORATION and PULLMAN, INCORPORATED,
Respondents.

BRIEF

Of Respondent Armco Steel Corporation in Opposition to Petition for Writ of Certiorari

OPINION BELOW

*In the report of the District Court's opinion, published in 359 F. Supp. 760, type-setting errors appear under "Findings of Fact," p. 761, paragraph 2, and under "Conclusions of Law" on p. 762, paragraphs 2 and 3.

The District Court's opinion, as printed in Appendix B to the petition filed in this court, omits changes made by the

* References, e.g. "(P6)" are to pages of the Petition; "(A6)" to Petitioner's Appendix; "(RA6)" to Respondent's Appendix.

court by amendment, pursuant to after-judgment suggestions and motion, to paragraph 4 of the Findings of Fact (A12), and to paragraphs 3 and 4 of the Conclusions of Law (A14, 15).

A copy of the part of the trial court's opinion relating to the claim of petitioner against Armco and Pullman and Pullman's Cross-claim against Armco, with the changes made by amendment italicized, appears as Appendix A to this brief.

JURISDICTION

Respondent contends that the petition supports none of the grounds suggested in Supreme Court Rule 19 for consideration in determining whether a writ of certiorari will issue, no ground of similar character, and no ground calling for the exercise of the court's discretion to issue the writ prayed.

QUESTION PRESENTED

The courts did not deny the protection of Section 402 A of the Restatement of Torts, Second, to the petitioner or to any railroad, as petitioner implies under the above caption, or rule that the standard of care required of supplier-manufacturers to petitioner or other railroads is limited by the American Association of Railroad's specifications. The judgment against petitioner is expressly based upon Section 402 A, and not upon the specifications of the A.A.R.

The question presented is whether petitioner, having based its claim solely upon Section 402 A of the Restatement of Torts, Second, should be granted the writ where, upon the facts and circumstances of the case, as found by both courts below, petitioner has failed to show any right to recover under the terms of the section it relies upon.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No constitutional or statutory provisions, or other matters referred to in Rule 23 (d) of this court, are involved in this case.

Under the above caption petitioner has set out the text of Section 402 A of the Restatement of Torts, Second, p. 347, but not the relevant comments thereunder. The latter appear in the Court of Appeals' opinion (A5-6), as follows:

> "That section requires that a product be 'sold in a defective condition unreasonably dangerous to the user * * * or his property' in order for strict liability to apply. Comment g defines a 'defective condition' as a 'condition not contemplated by the ultimate consumer which will be unreasonably dangerous to him.' Id. at 351. Comment i, in turn, provides that to be 'unreasonably dangerous,' '[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.' Id. at 352."

STATEMENT OF THE CASE

Petitioner's Statement, under the above-caption, (P2) does not adequately reflect the facts material to a consideration of the question presented. Paragraph 1 is a general description of the action and paragraph 2 a statement that petitioner's claim is based on Section 402A of the Restatement of Torts, Second. Paragraph 3 is a statement of petitioner's theory of the case.

Following is a statement of respondent's theory, (P4) which we cannot accept as a correct summary of respondent's position.

Respondent did not contend that the wheel was not unreasonably dangerous merely because it met AAR Specifications. Other evidence was adduced supporting respondent's contention that the wheel was not defective or unreasonably dangerous, and that petitioner fully contemplated all of its characteristics. The evidence strongly supported the trial court's finding that the wheel was a normal one, and that it was not excessively pitted. It is normal for as forged, hot-rolled wheels to develop scale pits on their surfaces during the manufacturing process. Petitioner's own employees testified that they were aware that wheels crack because of metal fatigue and for that reason they regularly inspect the wheels and replace those found to be cracked. (A7). The existence of fatigue cracks in railroad wheels is not unusual. The car was used by various railroads from May 13, 1966, until its derailment on December 19, 1969. It was inspected at each interchange by the receiving railroad. The inspections included an inspection of the wheels. (A3). The mate wheel, on the other end of the axle, was also cracked, which would indicate some unusual stress on the wheel which broke and its mate wheel, (A3, RA. 3).

The courts below concurred in finding the above to be the facts.

Finally, in its Statement of the Case, (P4) petitioner, in support of a contention that the trial court decided the case solely on the basis that the wheel met AAR Specifications, quotes a part of paragraph 3 of the court's Conclusions of Law (RA. 4), but omits the first sentence of the paragraph. When the entire paragraph is read, it becomes clear that petitioner's above contention is unfounded. The trial court, after stating in paragraph 2 of its Conclusions of Law that recovery in the case must comply with the theory of strict liability in torts said: (RA 4).

> "An essential requirement of a strict liability case is proof that the plaintiff was caused harm by reason of a

product which when sold was in a defective condition unreasonably dangerous to the user or consumer or to his property. Within the concept of strict liability, a defective condition is one not contemplated by the user which will be dangerous to him. By 'unreasonably dangerous' is meant that the product must be dangerous to an extent beyond that contemplated by those having the ordinary knowledge of the community as to the characteristics of the product. Railroads, including, of course, the plaintiff railroad, are the sole ultimate purchasers and users of railroad cars and wheels and the court finds that Frisco fully contemplated all of the characteristics of the wheel in question and that the wheel was neither defective nor unreasonably dangerous."

RESPONSE TO PETITIONER'S "REASONS FOR GRANTING CERTIORARI"

Under the above quoted caption (P6) petitioner asserts that the case presents the question, what standard of care the manufacturers of products sold to railroads must meet; that the Court of Appeals allegedly imposed a standard of care less rigid than that imposed by Section 402A, and thus deprived the railroads of the protection of said section. The alleged question, ruling of the court, and claimed result are substantially the same as petitioner raised in its Statement of the Case. In our response to Petitioner's Statement we have set forth the reasons why petitioner's said contention is unfounded. No purpose would be served by the repetition of our response at this point.

We agree generally with petitioner's contention (P6) that in tort litigation, industry standards are properly for consideration, but are not conclusive on the trier of the facts. Petitioner's implication that the courts below recognized industry standards as conclusive is not supported by the courts' opinions. They had the right to consider the AAR Specifications in connection with the issue with respect to petitioner's knowledge of the wheel's characteristics, and also in connection with Pullman's contingent cross-claim against Armco.

Petitioner argues (P7) that the focus under Section 402A is on the quality of the product and not on the plaintiff, and that the effect of the ruling below is that the same product may be held unreasonably dangerous to one person and not to another. We doubt that this proposition is embraced within the "Question Presented." However, petitioner elected to base its claim on Section 402A. The first paragraph of the section provides that one who sells any product in a defective condition unreasonably dangerous to the **user** or **consumer** is subject

to liability, etc. Comment g defines "defective condition" as a condition not contemplated by the ultimate consumer which will be unreasonably dangerous **to him.** Necessarily consumers will differ with respect to their knowledge of and experience with a product. If, as petitioner argues, this could result in a product being held unreasonably dangerous to one person and not to another, such would be result of the terms and definitions of the section in question. Whether a product is defective and unreasonably dangerous beyond the consumer's contemplation is a question of fact properly for the decision of the tryer of the facts. In the present case, the opinions below show that the courts considered all the facts and circumstances bearing on petitioner's knowledge of the product and contemplation of its characteristics. The problem petitioner suggests is not involved in this case and was not ruled upon below. We submit it provides no reason for the issuance of a Writ of Certiorari in this proceeding.

At the trial, petitioner based its case solely on Section 402A, of Torts 2d, of the Restatement. (A6, 12). The case was tried and determined below upon the theory that such section governed. Petitioner now (P8) seeks to substitute other theories of law and rules of decision in place of the terms and definitions of Section 402A. Whether the theory and rules now invoked should be followed in this case was not the subject of any ruling below. Respondent was not afforded any opportunity to offer evidence thereon. The tests and theories now brought forward by petitioner have not, to this date, been adopted by the American Law Institute as a part of its article on Torts, 2d.

The general rule governing judicial review, which confines the parties to the theory on which the case was tried below, is a just one, which we submit should be followed in this matter, and is a reason for not granting a writ on the basis suggested by petitioner.

Hynes v. Grimes Packing Co. (1949), 337 U.S. 86, 100, 93 L. Ed. 1231, 69 S. Ct. 968;
Adickes v. S. H. Kress & Co. (1970), 398 U.S. 144, 147 (footnote); 90 S. Ct. 1598, 26 L. Ed. 2d 142;
Lawn v. United States, 355 U.S. 339, 362 (footnote 6); 2 L. Ed. 321, 78 S. Ct. 311.

Petitioner argues (P9) that by holding that Petitioner is entitled to nothing more than the protection of the AAR Specifications, the courts below encouraged wheel and car manufacturers to provide the railroad industry with lower quality products. Our response is first, the courts below made no such ruling; second, the claim that the railroad industry, or any railroad individually, cannot obtain from its suppliers any improvements in its required products which it wants and is willing to pay for, is not plausible.

Petitioner denies participation in the wheel's specifications. (p. 9). The courts below found that the specifications were established by a vote of the AAR members, including petitioner, (A2), and that petitioner actively participated in the development of AAR specifications. (A6). This was but one of the factors considered in determining that petitioner fully contemplated all of the wheel's characteristics, and that the wheel was neither defective nor dangerous under the terms of Section 402A, Restatement of Torts Second. We have heretofore dealt fully with this matter. (p. 4-6, supra).

In regard to the findings of fact of a trial court, sitting as a jury, it has been the long established rule that the appellate courts will not interfere.

Zenith Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100, 123 [13], 23 L. Ed. 2d 129, 89 S. Ct. 1562.

The rule is particularly applicable in this case because the District Court and the Court of Appeals agreed in their findings. This court has held repeatedly, under the "two court rule," that it cannot undertake to review concurrent findings of fact by two

courts below, in the absence of a very obvious and exceptional showing of error. **Berenyi v. Immigration Service, 1967, 385 U.S. 380, 384 [1, 2] 87 S. Ct. 666, 17 L. Ed. 2d 656; Boehmer v. Pennsylvania R. Co., 1920, 252 U.S. 496, 498, 40 S. Ct. 409, 64 L. Ed. 680.**

The Supreme Court, on Certiorari, in diversity cases ordinarily adopts the determination of the Court of Appeals on local law, particularly where the same determination is made by the District Court.

> **Appalachian Power Co. v. American Institute of Certified Public Accountants, Per Mr. Justice Brennan. 1959, 4 L. Ed. 2d 30, 32 [4].**

Petitioner has had not only one day, but two days in court. It has failed to convince any of the judges who heard its claim below that it is entitled to recover under the evidence and the legal theory on which it bases its claim. It has failed to advance any valid reason why it should be granted a third hearing.

CONCLUSION

For the reasons stated above, respondent submits that the Writ prayed for by petitioner should be denied.

Respectfully submitted

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App. 1

APPENDIX

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT

This case was tried to the Court and the Court makes the following findings of fact and conclusions of law with respect to the principal cause of action between the St. Louis-San Francisco Railway Company and defendants Armco Steel Corporation and Pullman Incorporated.

Findings of Fact

1. Plaintiff, St. Louis-San Francisco Railway Company hereinafter referred to as "Frisco", is a corporation organized under the laws of the State of Missouri, with its principal place of business in St. Louis, Missouri, and is engaged as a common carrier by railroads in the States of Missouri, Tennessee, Kansas, Oklahoma, Alabama, and Florida. Defendant Armco Steel Corporation, hereinafter called "Armco", is a corporation organized under the laws of the State of Ohio, with its principal place of business in Middletown, Ohio, and is authorized to do business within the State of Missouri. Defendant Pullman Incorporated is a corporation organized under the laws of the State of Delaware, having its principal place of business in Chicago, Illinois. It is authorized to do business in Missouri. Third-party defendant Maryland Casualty Company is a stock insurance company, organized under the laws of the State of Maryland, with its principal place of business outside the States of Missouri and Illinois, and is authorized to do business in the States of Missouri and Illinois.

App. 2

2. Plaintiff Frisco seeks to recover damages for losses sustained to it when one of its trains derailed. Plaintiff alleges that the derailment was the result of a defective and unreasonably dangerous wheel which was manufactured by defendant Armco and installed by Pullman on a railroad car which was built and sold by Pullman to the plaintiff's lessor Trailer Train Company. Plaintiff's theory is strict liability in torts under section 402A, Restatement of Torts, Second. By cross-claim Pullman seeks indemnity against Armco in the event judgment is entered against it and by third-party claim Pullman seeks to be declared an insured under Armco's liability policy of insurance issued by Maryland Casualty Company.

3. In May 1966, Pullman agreed to manufacture and Trailer Train agreed to purchase 156 railroad cars described as 89 foot lo dek flatcars. Trailer Train is a corporation, the stock of which is owned by railroads doing business in the United States, of which Frisco owns approximately two and one-half percent of the stock. Trailer Train leases railroad cars to the various railroads throughout the United States.

4. Armco manufactured the wheel in question. This wheel was made according to specifications of the American Association of Railroads, of which Frisco is a member. *The wheel was inspected at the Armco factory for compliance with AAR specifications by railroad inspectors employed by Pennsylvania Railroad and working under contract to Trailer Train Company.* The wheel in question was purchased by Pullman. A hole was drilled in the center of the wheel, which was placed on the axle of a railroad car, delivered to Trailer Train, and this car was used by various railroads throughout the United States. On December 18, 1969, the car in question was loaded with fifteen new Chrysler automobiles at Valley Park, Missouri, and on December 19, 1969, was involved in a derailment near *Chelsea, Oklahoma.*

5. The car in question involved in the derailment was more or less in continuous service from May 1966 until the derailment in December 1969. The damage to plaintiff as a result of the derailment was $745,170.49.

6. The American Association of Railroads conducts continuous tests on various parts of railroad equipment, including railroad wheels and it sets the standards by which these wheels must be manufactured. Before a change can be made in specifications, it is necessary that all the railroads that are members approve these changes in specifications. Each railroad car, including the wheels, as it passes from one railroad to another at interchanges is inspected by the railroad receiving the car. In the manufacture of the particular wheel in question, there are scale pits on the surface of the wheel. This is a normal process for railroad wheels and it is also undisputed that scale pits may be removed by shot peening each wheel at an extra cost of approximately $1.00 per wheel. Scale pits increase the possibility of metal fatigue. Scale pits may also be removed by grinding the wheel, but such was not called for in the specifications. One of the disputed questions in this case is the cause of the wheel's failure. There is no question that metal fatigue caused the wheel to break down. The expert testimony was that the metal fatigue occurred at the cracks in the wheel which were in the vicinity of the scale pits. However, the mate wheel, that is the wheel on the other end of the axle, was also cracked, which would indicate some unusual stress on the wheel which broke and on its mate wheel.

7. In this case, Trailer Train by agreement with the Pennsylvania Railroad caused the wheel made by Armco and the car made by Pullman to be inspected at those respective plants by inspectors employed by Pennsylvania Railroad. The evidence

further shows that Armco's personnel inspected the wheel involved here and Armco, pursuant to Trailer Train's requirements, certified to Pullman that the wheel conformed to the American Association of Railroads specifications. While there is a dispute between the parties, the Court finds that the wheel in question did conform to the American Association of Railroads specifications.

8. The existence of fatigue cracks in railroad wheels is not unusual in the railroad industry and that is one of the reasons for inspections at interchanges. The manual of the American Association of Railroads requires that a wheel showing signs of fatigue cracks must be removed from service.

Conclusions of Law

1. This Court has jurisdiction by virtue of diversity of citizenship of the parties and the amount in controversy exceeds the sum of $10,000.00.

2. The Court is of the opinion that recovery in this cause must comply with the strict liability theory in Torts, section 402A, of Restatement of Torts, Second, which Missouri has adopted, **Keener v. Dayton Electric Manufacturing Co.** 445 S.W.2d 362 (Mo. 1969).

3. An essential requirement of a strict liability case is proof that the plaintiff was caused harm by reason of a product which when sold was in a defective condition unreasonably dangerous to the user or consumer *or* to his property. Within the concept of strict liability, a defective condition is *one not* contemplated by the user which will be dangerous to him. By "unreasonably dangerous" is meant that the product must be dangerous to an extent beyond that contemplated by those having the ordinary knowledge of the community as to the

characteristics of the product. Railroads, including, of course, the plaintiff railroad, are the sole ultimate purchasers and users of railroad cars and wheels and the Court finds that Frisco fully contemplated all the characteristics of the wheel in question and that the wheel was neither defective nor unreasonably dangerous.

4. Judgment will be entered for both defendants and against the plaintiff. In view of this finding, Pullman has sustained no loss to Frisco and consequently on its cross-claim for indemnity against Armco, *the issues are moot and Pullman's cross-claim for indemnity will be dismissed.*